(4)

NO. 90-974

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

and

JESSE OLIVER, *et al.*,
*Petitioners,*

v.

JIM MATTOX, *et al.*,
*Respondents.*



## HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S BRIEF IN OPPOSITION TO LULAC *ET AL.*, AND JESSE OLIVER, *ET AL.*'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether elected state judges are "representatives" within the scope of § 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), and, if so, whether § 2(b) is constitutional as thus interpreted?

2. Whether independent overlapping county-wide judicial election districts are within the scope of § 2(b) of the Voting Rights Act and, if so, whether § 2(b) is constitutional?

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Respondent Harris County District Judge Sharolyn Wood ("Judge Wood") files this Brief in Opposition to the League of United Latin American Citizens ("LULAC"), *et al.* and Jesse Oliver, *et al.*'s Petition for a Writ of Certiorari to urge that the writ not be granted since the *en banc* judgment of the Fifth Circuit Court of Appeals is correct. In the alternative, Judge Wood urges

that all and only those issues properly presented in the record of this case be reviewed by this Court.[1]

## OPINIONS BELOW

Judge Wood incorporates by reference the statement of Opinions and Judgments Below set out in her Brief in Opposition to Houston Lawyers' Association's ("HLA" 's) Petition for Writ of Certiorari, No. 90-813, at 2. The opinions and judgments below are reproduced in the Appendix filed by the HLA, hereinafter referred to as "Pet. App."[2]

## JURISDICTION

Judge Wood incorporates by reference the statement of jurisdiction set out in her Brief in Opposition to HLA's Petition at 2.

## STATUTES INVOLVED

Judge Wood incorporates by reference the statement of Constitutional Provisions and Statutes Involved set out in her Brief in Opposition to HLA's Petition at 3.

## STATEMENT OF THE CASE

Judge Wood incorporates by reference the Statement of the Case set out in her Brief in Opposition to HLA's Petition at 3-10.

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1. Judge Wood has previously filed a Brief in Opposition to the Petition for Writ of Certiorari filed in this case by the Houston Lawyers' Association ("HLA"), No. 90-813. The HLA was a Plaintiff/Intervenor in this case, in which LULAC, *et al.* were the original Plaintiffs and Jesse Oliver, *et al.* were Plaintiff/Intervenors. Judge Wood urges that No. 90-813 and this Petition be consolidated and considered together. The parties are the same for both Petitions and are listed in Judge Wood's Opposition to the HLA's Petition at II-III.

2. LULAC did not file a separate Appendix.

## REASONS FOR DENYING THE WRIT

### 1. Petitioners Incorrectly Claim That This Case Presents A Conflict With Decisions Of This Court.

Judge Wood incorporates by reference the statement of Reasons for Denying the Writ set out in her Brief in Opposition to HLA's Petition for Writ of Certiorari at 11 and adds the following arguments.

LULAC bases its principal argument for certiorari on the claim that the *en banc* decision of the Fifth Circuit Court of Appeals in this case conflicts with this Court's summary affirmance of two district court cases applying § 5 of the Voting Rights Act, 42 U.S.C. § 1973, to judicial elections, *Haith v. Martin,* 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd mem.,* 477 U.S. 901, 106 S. Ct. 3268 (1986), and *Georgia State Bd. of Elecs. v. Brooks,* No. 288-146 (S.D. Ga. 1989), *aff'd mem.,* 111 S. Ct. 288 (1990). Pet. at 11. Petitioners base their claim on the artful phrasing of the question in *Brooks* as "Whether the Voting Rights Act Should Be Construed to Apply to the Election of Judges." Pet. at 13. Petitioners overreach themselves, however, in arguing that this Court's summary affirmance of *Brooks* has somehow decisively settled the legal issue of the applicability of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, to the judiciary. Pet. at 13.

No matter how Pretitioners phrase the issue in *Brooks,* this Court accords only limited *stare decisis* effect to summary affirmance, stating, "A summary disposition affirms only the judgment of the Court below and no more may be read into our action than was essential to sustain that judgment." *Anderson v. Celebrezze,* 460 U.S. 780, 103 S. Ct. 1564, 1568 n. 5 (1983); *see also Davis v. Bandemer,* 478 U.S. 109, 121, 106 S. Ct.

2797, 2804 (1986) (summary disposition of an issue does not preclude further consideration of important issues). The *stare decisis* effect of *Brooks* is therefore limited to the facts of *Brooks*—a § 5 preclearance case. *Brooks* does not present any binding precedent in this case, and it does not preclude this Court's review of the important § 2 issues presented.

Apart from the effect of a summary affirmance by this Court, however, Petitioners appear to argue that the district court decisions in *Brooks* and *Haith* in themselves create a conflict with the Fifth Circuit's decision in this case. The basis of the conflict is apparently the claim that if § 5 applies to the judiciary, § 2 must apply. Indeed, Petitioners argue that, "Given the identical language in Sections 2 and 5, basic tenets of statutory construction require that the sections be given identical meaning." Pet. at 12. They argue that because § 5 was accorded the "broadest possible scope" by this Court in *Allen v. State Bd. of Elecs.*, 393 U.S. 544, 566-567 (1969), § 2 must similarly be accorded the broadest possible scope. Pet. at 13. Both claims are false. The applicability of § 5 of the Voting Rights Act to judicial elections was neither challenged nor disputed in this suit. Moreover, the attempt to equate §§ 2 and 5 is misleading and fallacious, as the Fifth Circuit recognized in its *en banc* majority opinion, stating that the application of § 5 of the Voting Rights Act to judicial elections does *not* entail the application of § 2 as well. Pet. App. at 29a.

In fact, the referenced language of §§ 2 and 5 cited by Petitioners as "identical"—and therefore requiring the same construction—is *not* identical. Section 5 requires that certain specific states preclear with the Justice Department

> any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1972.

42 U.S.C. § 1973c, Pet. at 4. Section 2 makes illegal any illegal any

> voting qualification or prerequisite to voting, or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

42 U.S.C. § 1973, Pet at 2-3. This difference in language makes is clear that the two section have completely different thrust and scope; and, indeed, both the legislative history of the 1982 amendments to the Voting Rights Act and Supreme Court authority expressly caution against the fallacy of equating §§ 2 and 5.

In its official statement for the record of the intended meaning and operation of the 1982 amendments to the Voting Rights Act, Congress stated that the analogy between §§ 2 and 5 is "fatally flawed for several reasons." S. Rep. 417, 97th Cong., 2d Sess. 42, *reprinted* in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 219-220. Congress explained that there is a "fundamental difference" between "the degree of jurisdiction needed to sustain the extraordinary nature of preclearance" required by § 5 and "the use of a particular legal standard to prove discrimination" under § 2. *Id.* at 220. In its view,

> section 2 . . . is less intrusive on state functions. As Justice Powell has stated "(p)reclearance involves a broad restraint on all state and local voting practices. . . ." *City of Rome v. United States,* 446 U.S. at 202-

> 203, n. 13 (Powell, J. dissenting). By contrast, amended section 2 does not require federal preclearance of anything it merely prohibits practices that can be proven in a court of law to have discriminatory results.

*Id.* (quoting testimony of Professor Dorsen). At the same time, Congress expressed its intent and confidence that § 2 cannot result in "wholesale invalidation of electoral structures," which is, of course, the very result sought by Petitioners. *Id.* at 213.

Similarly, in the original Supreme Court case interpreting § 5, *South Carolina v. Katzenbach,* this Court cautioned,

> We emphasize that only some of the many portions of the [Voting Rights] Act [of 1965] are properly before us. *South Carolina has not challenged §§ 2 . . . and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litigation.*

383 U.S. 301, 316, 86 S. Ct. 803, 812 (1966) (emphasis added). Thus the language of the Voting Rights Act and Congress indicate that §§ 2 and 5 should not be accorded identical scope, and this Court has specifically reserved the question.

Moreover, to the extent either section is to be employed in interpreting the other, the Justice Department, in codifying its responsibilities pursuant to § 5, 42 U.S.C. § 1973c, requires that the interpretation of § 2 (and other sections of the Voting Rights Act) be used as a guideline in interpreting § 5, not—as Petitioners would have it—vice versa. The Code of

Federal Regulations sets out specific guidelines for the Attorney General to follow "in making substantive determinations under section 5 and in defending section 5 declaratory judgment actions." 28 C.F.R. (7-1-89 Ed.) Ch. 1 § 51.51. Those regulations provide:

> (a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), section 2, 4(a) 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgement on account of race, color, or membership in a language minority group.

28 C.F.R. (7-1-89 Ed.) Ch. 1 § 51.55. In other words, the Attorney General is to be guided in assessing the potentially discriminatory effect of changes in voting practices by the requirements of various provisions designed to safeguard the right to vote, including § 2. He is not to interpret those sections by reference to the broad language of § 5. The argument that § 2 must be accorded the broadest possible scope because § 5 has been accorded such scope is exactly the reverse of the procedure adopted by the Justice Department. Nevertheless, it is important to realize exactly what is at issue in this case—and it is *not* the full scope and applicability of § 2, much less the scope of §§ 2 and 5 together.

While the Petition leaves the impression that the Fifth Circuit held that § 2 does not ever apply to the judiciary, that is not the case. The Fifth Circuit, in fact, interpreted

only part of § 2 of the Voting Rights Act. Judge Gee in his majority opinion expressly observed that the court's inquiry was limited to the question whether the language in § 2(b) prohibiting discriminatory practices in the election of "representatives" could be applied to the judiciary. Pet. App. at 12a and 12a n. 6.[3] The effect of this limitation, as the Court stated, was to restrict the Fifth Circuit's opinion to a ruling on the issue whether vote dilution claims can be brought in judicial elections. Pet. App. at 28a. The majority refused to decide whether § 2(b)'s prohibition of voting practices that result in a denial of a protected class' opportunity to participate in the political process applies to the judiciary, since that was not at issue. *Id.* However, the majority specifically indicated that

> protecting [the opportunity to participate in the political process] appears to involve all of the primal anti-test, anti device concerns and prohibition of original Section 2; and its provisions may well extend to all elections whatever. These broader considerations center on the voter and on his freedom to engage fully and freely in the political process, untrammeled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, those safeguards may apply as in any other election, a matter not presented for decision today.

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3. The relevant passage from the Act provides,

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have *less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.*

42 U.S.C. § 1973(b) (emphasis added).

Pet. App. at 12a-13a. The court further observed,

> [A]s we have noted, *it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections,* as may the results test to claims other than those of vote dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in any electoral aspect.

Pet. App. at 28a (emphasis added). The Fifth Circuit's ruling is thus limited to one specific type of discrimination claim—although a very important one—the claim that the votes of a protected class can unintentionally be diluted through a state's structure of its judicial election system, in violation of § 2.

Since Petitioners' claims of a conflict between decisions of this Court and the Fifth Circuit opinion in this case rest on a fallacious equation of the scope of §§ 2 and 5 (the latter section not being at issue in this case) and overbroad readings of both the power of summary affirmance and the Fifth Circuit's *en banc* holding regarding the applicability of § 2(b)'s vote dilution prohibition to judicial elections, Petitioners' conflict claim is without merit and should be rejected as a basis for granting certiorari.

## II. The Conflict Between *LULAC* and *Mallory v. Eyrich* Does Not Require Resolution By This Court.

While no conflict exists between this § 2 case and the two § 5 district court cases cited by Petitioners, there is, as Petitioners point out, a true conflict between this case

and *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). Pet. at 11. Petitioners analyze the conflict in terms of two issues on which *LULAC* and *Mallory* differ: (1) whether judges are "representatives" for purposes of the Voting Rights Act and (2) whether the non-applicability of the one person, one vote principle to judicial elections forecloses a vote dilution claim. Pet. at 14-18. Since both of these issues are thoroughly explored and far more effectively settled in the *LULAC* majority opinion, the conflict with *Mallory* does not require resolution by this Court.

The *en banc* Fifth Circuit opinion exposes the inherent fallacy in attempting to define judges as "representatives." Pet. App. at 7a-19a. In that opinion, the Fifth Circuit majority began by observing that § 2 should not be pushed beyond its clear language "because of the highly intrusive nature of federal regulation of the means by which states select their own officials." Pet. App. at 3a. Carefully examining the text of § 2 and its genesis, the court analyzed the background to the 1982 amendments to the Act, paying particular attention to the origin of the results test in legislative redistricting actions and to the traditional (indeed, prior to 1982, the universal) interpretation of the term "representative" by the courts as a term exclusive of the judiciary. Pet. App. at 5a-17a. It concluded that, in revising § 2 in 1982 to incorporate the "results" test promulgated in *Whitcomb v. Chavis*, 403 U.S. 124, 93 S. Ct. 1858 (1971) and *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), Congress intended to extend that test no further than the legislative and executive branches and selected its language carefully to reach that result. Pet App. at 4a. Given the apparent care taken in the choice of the word "representative" in § 2(b),

it makes a mockery of customary canons of statutory construction to argue, as Petitioners do, that this careful specificity should give way to the general definition of the term "voting" in 42 U.S.C. § 1973*l*(c)(1).

The Fifth Circuit majority paid particular attention to *Wells v. Edwards,* 347 F. Supp. 453 (M.D. La. 1972), *aff'd,* 409 U.S. 1095 (1973). *Wells* held that the one person, one vote principle does not apply to the judiciary since,

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

Pet. App. at 18a (quoting *Wells,* 347 F. Supp. at 455-56). The Fifth Circuit stated,

> It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells,* did not concur in that reasoning.

Pet. App. at 19a.

Petitioners, however, point out that while *Mallory,* like the Fifth Circuit Majority opinion in this case, accepts the rule in *Wells* that the one person, one vote principle does not apply to the judiciary, *Mallory* rejects *Wells'* reasoning that the principle does not apply because judges are not "representatives" covered by the principle. Instead,

*Mallory* holds that the one person, one vote principle addresses a fourteenth amendment equal protection problem, while analysis of a § 2 claim does not involve the fourteenth amendment but only statutory construction. Pet. App. at 17. This difference, Petitioners' argue, creates a conflict that this Court must resolve. *Id.* Neither Petitioners nor *Mallory* purport to explain *Mallory's* surrealistic rationale that a court can engage in statutory construction in some sort of constitutional vacuum without implicating the fourteenth amendment. Judge Wood respectfully suggests that *Mallory*, confronted by *LULAC*, fails as persuasive precedent without the need for this Court's intervention. No statutory construction is permissible that results in or leaves untouched a fourteenth amendment violation.

No review is required because the Fifth Circuit's analysis of the origin of § 2 lays to rest *Mallory's* purported distinction between § 2 and the fourteenth amendment. As the Fifth Circuit majority opinion points out, the concept of *individual* vote dilution was first developed by this Court in the legislative apportionment case of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), which provided a standard of measure and a remedy for individual vote dilution by promulgating the doctrine of one-person, one vote under the Constitutional authority of the Fourteenth Amendment. Pet. App. at 21a. Subsequently, the concept of one person, one vote provided the foundation for the concept of *minority* vote dilution elaborated in *Whitcomb* and *White*. Pet. App. at 21a. Thus, both the general concept of individual vote dilution and the specific concept of minority vote dilution are integrally related to the concept of one person, one vote. Moreover, *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct.

2752 (1986)—the only case in which this Court has reviewed the concept of minority vote dilution since the Voting Rights Act was amended in 1982—presupposes that the one person, one vote principle applies to elections covered by § 2 and builds into the test for vote dilution a potential remedy through the use of single member districts in which the aggrieved minority can constitute a majority.[4]

In light of *Reynolds, Whitcomb, White* and *Gingles,* the Fifth Circuit found itself compelled to conclude that vote dilution analysis can only be meaningful in cases in which the principle of one person, one vote applies. Indeed, it correctly observed that without the individual right of one person to one vote there is no standard of appropriate individual vote strength against which to measure alleged dilution; hence a court "can fashion no remedy to redress the non-existent wrong complained of here." Pet. App. at 20a-21a. Thus, if a court acknowledges the holding in *Wells* that the one-person, one vote standard does not apply to the judiciary, it must logically conclude, as the Fifth Circuit did, that "judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members." Pet. App. at 20a. If one person, one vote does apply, despite *Wells,* every state which elects judges must totally restructure its judicial electoral districts and hence its judiciary since, as discussed below, those districts are

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4. As the Court is well aware, *Gingles* requires minority plaintiffs to meet an initial threshold burden of proving (1) that the minority is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority is politically cohesive; and (3) that "the white majority votes sufficiently as a block to enable it, in the absence of special circumstances . . . usually to defeat the preferred candidate of the minority." 458 U.S. at 50-51, 106 S. Ct. at 2766-2767.

currently crafted to reflect many different, legitimate concerns having nothing to do with minority voters or judges.

The Fifth Circuit's five-judge concurring opinion, authored by Judge Higginbotham, also points up the impossibility of devising a constitutional remedy for supposed vote dilution in the narrower field of district judge elections. Although Judge Higginbotham attributed the lack of remedy for perceived vote dilution in district judge elections to the fact that trial judges are sole decision-makers within their districts, rather than to the fact that trial judges are not "representatives" of their constitutencies' special interests, Pet App. at 92a, the broad conclusion reached by the concurring judges is essentially the same as that reached by the majority: application of the concept of vote dilution to an elected state judiciary is inconsistent with fundamental legal concepts and constitutional requirements.

As Judge Higginbotham points out, each trial judge is an official who exercises his full authority alone and whose authority has its source in an electorate coterminous with the jurisdiction of the court, so that there can be no dilution of votes for that sole decision-making office. Pet. App. at 93a. But, as Judge Higginbotham also acknowledges, the problem of applying the concept of vote dilution to trial judges does not stop there: "the fact that trial judges act singly is also integral to the linking of jurisdiction and elective base." Pet App. at 93a. Thus,

> Saying that district judges in fact share a common office that can be subdistricted does not make it so. Nor does the assertion that function is not relevant make sense.

*Id.*

Judge Higginbotham points out numerous important interests involved in the structuring of state judicial election systems that would be profoundly affected by the application of the vote dilution principle and Petitioners' preferred remedy—subdistricting—to single-bench judicial districts. For example, in the larger Texas counties, although district courts are courts of general jurisdiction, some judges are elected specifically to handle only juvenile or family law or criminal cases. Pet. App. at 101a. This structure, like many others created over the decades to accommodate specialized docket needs, geographical considerations, or other reflections of non-racial functional specificity, would be complicated, if not precluded, by the creation of subdistricts designed solely to fulfill minority voter quotas. As Judge Higginbotham further argues, to break the linkage between jurisdiction and elective base may well *lessen* minority influence instead of increasing it. If there be any validity to Petitioners' claim that in some broad sense elected judges are representative of the voters who elect them, in a world of racially and ethnically structured sub-districts minority voters would have no influence on the election of most judges and, more likely than not, a minority litigant would be assigned to appear before a judge who was not elected from a district with greater than a 50% minority population. Pet. App. at 105a-107a. Further, requiring subdistricting to correct for vote dilution.

> would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence—a core element of a judicial office. Trial judges would still exercise their full authority alone, but that authority would no longer come from the entire electorate within their

> jurisdictional area. Subdistricting would result in decisions being made for the county as a whole by judges representing only a small fraction of the electorate.

Pet. App. at 108a. Judge Higginbotham concludes that this violence done the system not only would interfere with the state's fundamental right to structure its judiciary without federal interference but it might also retard the goals of the Voting Rights Act itself. Pet. App. at 111a.

The concerns expressed by Judge Higginbotham are not inconsequential considerations lightly arrived at, but extremely serious consequences to be reckoned with if § 2 of the Voting Rights Act is applied to the judiciary in general and to state district judge elections in particular. Respondent Wood and the Fifth Circuit majority would differ from Judge Higginbotham and those judges who concurred with him only by arguing that the violence done to the judiciary by application of § 2 vote dilution principles to those elections stems from an even more radical root than the fact that district judges are sole decision-makers whose authority is coterminous with their electoral base and jurisdiction: it stems from the non-representative nature of the judiciary. A state judiciary is either elected or appointed, as a state chooses, in order to serve the fundamental state interests of fairness and efficiency in the administration of justice and not at all to serve the special interests of any group of constituents, whether black or white, rich or poor, Jewish or Christian, residents of one neighborhood or residents of another. For that reason it necessarily does radical violence to the concept of an independent state judiciary, as well as to many constitutional and statutory principles, to insist that judicial districts be drawn solely to conform to demographic

distribution or to insure the proportional representation of minorities in the judiciary (which is ultimately the same thing). Judges are not representatives of their constituents, and judicial districts should not be structured to insure proportional racial representation.

Given the Fifth Circuit's decisive refutation of *Mallory*, it is not necessary for this Court to review the same issues. It should refuse to grant certiorari on the ground of a conflict between this case and *Mallory*.

## III. Petitioners' Claim Of Authoritativeness For The United States Attorney General's Interpretation Of The Voting Rights Act, In Contrast To The Fifth Circuit's Interpretation, Is Erroneous And Presents No Ground For Certiorari.

Finally, Petitioners claim that the interpretation of the Voting Rights Act by the Attorney General, who appeared as amicus for the plaintiffs in this case, is authoritative. Pet. at 18. In support of their claim Petitioners cite *United States v. Board of Comm'rs of Sheffield, Ala.* 435 U.S. 110, 131 98 S. Ct. 965 (1978), in which this Court deferred to Attorney General Katzenbach's interpretation of § 5 of the Voting Rights Act on the ground that the Attorney General played an extensive role "in drafting the statute and explaining its operation to Congress." Pet. at 18. No one can contend that either the current Attorney General or Assistant Attorney General John Dunne, who has participated in this case as amicus, played a key role in drafting § 2 of the Voting Rights Act in 1965 or in amending it in 1982. Therefore the rationale for the deference paid by

this Court to Attorney General Katzenbach in 1978 entirely disappears. But there is a still more compelling reason for rejecting the argument that the United States Attorney General's interpretation of the Voting Rights Act is authoritative.

The Attorney General plays a statutorily mandated role in interpreting § 5 of the Voting Rights Act since he is required by law to preclear changes in voting practices and procedures in the affected states.[5] By contrast, the United States Attorney General plays no necessary role in § 2 cases. Nor, as argued above, is the Attorney General accorded free rein to interpret even § 5 at his whim. Rather, stringent federal regulations prescribe in detail the procedure the Attorney General must follow in interpreting § 5, including deferring to guidelines established by constitutional and statutory provisions designed to safeguard the right to vote — provisions which include § 2. *See supra* at 7. Moreover, the same regulations which require the Attorney General to be guided by those provisions explicitly require him to be guided by the federal courts' interpretation of the relevant provisions.[6] Thus, it is entirely wrong and misleading to assert that this or any federal Court must defer to the Attorney General's unilateral reading of § 5 when that Court is faced with interpreting the Voting Rights Act.

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5. *See* 42 U.S.C. § 1973c, reprinted in Appendix to Judge Wood's Brief in Opposition to HLA's Petition ("Wood App.") at 4a; *see also* 28 C.F.R. (7-1-89) Ch. 1 § 51.51 *et seq.*

6. Applicable federal regulations provide in relevant part,

> § 51.56 Guidance from the courts.
>
> In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts.

As an example on point, Assistant Attorney General Dunne this autumn refused preclearance of the creation of 15 new district judgeships in Texas, in part because he personally disagreed with the *en banc* decision in *LULAC*. *See* Opinion Letter of Assistant Attorney General John Dunne to Texas Elections Division. App. at 305a-307a. Petitioners the Houston Lawyers' Association introduced Attorney General Dunne's letter to the Texas Election Division into the record of this case as support for their claim (identical to LULAC's claim) that the opinion of the Attorney General is authoritative *even* in § 2 cases in which the Attorney General is not a party and which present no § 5 issues. Subsequently the Mexican American Bar Association of Texas ("MABA") brought suit against the State of Texas before a three-judge court in the Western District of Texas seeking to enjoin the State from seating the new judges. That case was consolidated with a suit brought by the United States on the same issue. On December 26, 1990, the three-judge court ruled that the new benches had been precleared by operation of law before the Attorney General made his untimely objection. *Mexican Amr. Bar Ass'n of Texas v. State of Texas,* No. MO-90-CA-171 (W.D. Tex., Dec. 26, 1990). *MABA* by itself should lay to rest Petitioners' claim that the Attorney General's or the Assistant Attorney General's interpretation of the entire Voting Rights Act is final. Petitioners' argument that the *LULAC* opinion should be reviewed because the Attorney General disagrees with it is without merit and should be rejected by this Court.

## IV. If The Court Grants Certiorari It Should Consider All And Only Those Issues Presented By This Case.

For the foregoing reasons, this Court should deny certiorari to review the scholarly and thorough *en banc* opinion of the Fifth Circuit Court of Appeals in this case. Nevertheless, Judge Wood recognizes the validity of Petitioners' final argument that fundamental rights are at issue in this case — although she would frame those issues in a larger context than the single, admittedly fundamental, issue of voting rights. Pet. at 19-20. Not only are voting rights at issue, but also fundamental principles of due process, equal protection, the applicability or inapplicability of the one man, one vote principle to judicial elections and the fundamental right of a state to structure its judiciary. Judge Wood has already explored briefly these and other issues presented by the case in her Brief in Opposition to HLA's Petition and hereby incorporates those arguments by reference. She therefore recognizes that the Court may well decide that certiorari is justified. In that event, she urges the Court to confine its review to the profound issues properly raised by this case and argued below and not to cloud those issues by granting certiorari to review other issues and other Voting Rights Act cases when and if it reviews this case.

## CONCLUSION

For the foregoing reasons, Harris County District Judge Sharolyn Wood respectfully requests that the Court deny the Petition for Writ of Certiorari or, in the alternative, that it grant certiorari to review all and only those issues fairly presented by this case and developed below.

Respectfully submitted,

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